IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2123 OF 2005

Nazir Mehtab Shaikh ...Petitioner
Vs.
The State of Maharashtra ...Respondent

Mr. R.S. Kulkarni i/by Mr. Vijay Mane for the Petitioner.
Mr. K.V. Saste, A.P.P. for the Respondent.

CORAM : A. S. OKA, J.
DATE : SEPTEMBER 27, 2005.

P.C.:

1. On the last date the Advocates appearing for the parties were heard fully and today Petition is kept for dictation of order. The Petitioner is the original accused. The Petitioner is facing the charge of offence punishable under sections 227, 337, 338 and 427 of the Indian Penal Code. An Application was made on 20th June, 2004 on behalf of the Petitioner for recalling the prosecution witness Shivaji Dattu Patil. By the order impugned, the said Application has been rejected.

2. With a view to appreciate the submissions made by the Advocates appearing for the parties, it will be necessary to refer to the facts of the case. The case of the complainant appears to be that on 01st December, 1998 he was coming back from his field. He was travelling in a bullock cart. From the rear side, one S.T. bus came in excessive speed and dashed against the rear side of the bullock cart on its right side. The complainant and other occupants of the

bullock cart were thrown away as a result of impact of the accident and the complainant and other two persons suffered injuries. In the cross-examination of the first informant, a suggestion was given on behalf of the Applicant that the first informant had not seen the driver. After denying the correctness of the suggestion, he volunteered that he was shifted to the hospital and the driver of the S.T. Bus was continuously with him for two to three days. The contention of the Petitioner is that the said statement that the driver was continuously with the first informant for two to three days does not find place in the statement of the complainant recorded by the Police under section 161 of the Code of Criminal Procedure, 1973 and therefore, the said witness deserves to be recalled for cross-examination. While rejecting the said Application, learned Additional Sessions Judge observed that the witness has not made the said statement in his examination-in-chief. The learned Judge was of the view that it cannot be said that the witness has proved the fact stated before the Police in the examination-in-chief and therefore, the Petitioner was not entitled to use the statement recorded by the Police for contradicting the witness.

3. The learned Counsel appearing for the Petitioner relied upon a decision of the Apex Court

reported in 1959 Supreme Court Page 1012(Tahsildar Singh & Anr. Vs. State of U.P.). The learned Counsel appearing for the Petitioner submitted that in some cases an omission in statement under section 161 of the said Code may amount to contradiction in the deposition before the Court. He submitted that in such case, the accused is certainly entitled to cross-examine the witness for contradicting him on the basis of his prior statement. He placed reliance on various paragraphs of the aforesaid decision of the Apex Court including paragraph No.20. He submitted that the learned Judge has taken erroneous view of the matter and therefore, interference is required. The learned A.P.P. opposed the Petition by pointing out that a view taken by the learned Trial Judge is in consonance with the law laid down by the Apex Court.

4. I have considered the submissions. A reference will have to be made to the decision of the Apex Court in the case of Tahsildar Singh(Supra). The submission before the Apex Court was that a witness can be asked a question whether he made a particular statement before the Police Officer. If he says yes, the said assertion can be contradicted by putting an the earlier statement which does not contain such a statement. It was submitted before the Apex Court that the word "contradiction" is of such a vide

connotation that it takes in all material omissions and court can decide whether there is one such omission as to amount to contradiction only after the question is put, answered and relevant part of it is marked. The Apex Court dealt with one more submission which is recorded in paragraph No.20 of the majority judgment which reads thus:

> 20. It is broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. This contention ignores the intention of the legislature expressed in Section 162 of the Code and the nature of the non-evidentiary value of such a statement, except for the limited purpose of contradiction, unrecorded statement is completely excluded. But record of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction,the object of the section would be defeated. By that process, if a part of a statement is recorded, what was not stated could go in on the sly in the

> name of contradiction, whereas if the entire statement was not recorded, it would be excluded. By doing so, we would be circumventing the section by ignoring the only safeguard imposed by the legislature, viz, that the statement should have been recorded.

After considering the law on the point the Apex Court summarised the proposition of law which emerged in paragraph No.26. Paragraph No.26 reads thus:

> 26. From the foregoing discussion the following propositions emerge:(1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness box and for no other purpose; **(2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because**

it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases:(i) when a recital is necessarily implied from the recital or recitals found in the statement: illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word "only" can be implied i.e., the witness saw A only stabbing B: (ii) a negative aspect of a positive recital in a statement; illustration; in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion: and (iii) when the statement before the police and that before the Court cannot stand together: illustration: the

> witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing i.e., at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false. (Emphasis supplied)

The Apex Court held that a statement in writing made by the witness before the police officer in course of investigation can be used only to contradict his statement in the witness box and for no other purpose. The Apex Court further held that statement not reduced in writing by the police officer cannot be used for contradiction. However, the Apex Court noted that though a particular statement may not be expressly recorded, the statement can be deemed to be part of that expressly recorded statement and can be used for contradiction not because it is an omission but because it is deemed to form part of recorded statement. However, the Apex Court in Paragraph No.26 noted that such a deemed fiction can be invoked only

in three cases (i) when a recital is necessarily implied from the recital or recitals found in the statement, (ii) when the statement before the police and before the court cannot stand together (iii) it is a negative aspect of positive recital in the statement.

5. The controversy in the present Petition will have to be considered in the light of what has been held by the Apex Court. In the cross-examination, the complainant stated that driver of the S.T.Bus was with him for two to three days. In examination-in-chief he has stated that he had seen S.T.driver who was present in the court. On plain reading of the evidence it cannot be said that the deemed fiction referred to in the Paragraph No.26 of the decision can be invoked. It cannot be said that whatever is stated in cross-examination regarding presence of S.T. driver for two to three days can be necessarily implied in the recitals found in the statement. Neither it can be said that the statement before the police and court cannot stand together. If this is so, it is obvious that the Petitioner cannot seek to cross-examine the complainant on the basis of prior statement of the complainant. No fault can be found with a view taken by the learned Trial Judge. Hence, Petition is rejected.

JUDGE